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No. 84-1445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROY K. MOORE, JAMES O. INGRAM,
and THOMAS FITZPATRICK,

Petitioners,

—v.—

MUHAMMAD KENYATTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals properly concluded that a denial of qualified immunity is not subject to interlocutory appeal.

STATEMENT OF THE CASE

Respondent Muhammad Kenyatta brought this Bivens damage action against three agents of the Federal Bureau of Investigation (FBI) -- the petitioners -- all in their individual capacities. Respondent alleges that the petitioners conducted political intelligence operations against him because of an invidious racial animus and because of the political content of his speech and associations, rather than for any legitimate law enforcement purposes.

A. FACTUAL BACKGROUND

In the late 1960's, Muhammad Kenyatta was an outspoken civil rights activist in Mississippi. The petitioners, then all FBI agents stationed in Mississippi, subjected Kenyatta to abusive counterin-

telligence measures under the rubric of "COINTELPRO."[1]

Among other things, the petitioners forged a letter that was intended to cause respondent to believe that he had lost political support in his community, to discourage him from speaking or inviting

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[1]The courts have encountered COINTELPRO before. See, United Klans of America v. McGovern, 621 F.2d 152 (5th Cir. 1980) (complaint dismissed because of statute of limitations). Although that case involved COINTELPRO-White Hate Group, as opposed to the COINTELPRO-Black Nationalist Hate Group operations in this case, the counterintelligence techniques employed were essentially the same. As recognized by this Court, even the Department of Justice has conceded that at least some of those techniques were "abhorrent in a free society." Id., at 154; see also, n.7 describing those abhorrent techniques, many of which were used against the plaintiff in this case.

See also, Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), cert. denied sub nom. Brennan v. Hobson, 53 U.S.L.W. ___ (March __, 1985) which specifically involved COINTELPRO-Black and describes the political and racial characteristics of that intelligence program.

others to speak at Tougaloo College, and to threaten his well-being if he did not leave Mississippi. Contemporaneous memoranda, and the petitioners' own testimony, make clear that respondent was selected for counterintelligence attention by the petitioners because of his race and because of the content of his political speech and activities.

The petitioners also provided information about the respondent to representatives of the organizations that funded his civil rights activities. Petitioners themselves described that information as "derogatory" and admit disseminating that derogatory information in order to cause the termination of respondent's political activities. And after the funding was discontinued, the petitioners took credit for achieving that

result.

Finally, the petitioners have admitted that at no time did they ever have any evidence that respondent violated any law within the FBI's investigative jurisdiction.

B. PROCEDURAL BACKGROUND

In the course of the proceedings below, the courts have rejected every affirmative defense asserted by petitioners, including qualified immunity. That qualified immunity defense was the subject of a motion for judgment filed by petitioners subsequent to this Court's decision in Harlow v. Fitzgerald, 457 U.S. 800 (1982).

After full briefing and argument, the district court denied petitioners' motion on the ground that their conduct violated

respondent's "first amendment freedoms clearly established in the late 1960's" (Pet. App., 20a, at 25a-26a). (Apparently because that clear First Amendment law was alone sufficient to deny the motion, the district court specifically declined to reach the respondent's additional contention that his racial discrimination and other claims were also sufficently well established to warrant denying the qualified immunity motion. Pet. App., at 25a.) The petitioners appealed that decision to the Court of Appeals, pursuant to 28 U.S.C. §1291.[2]

The petitioners' initial Court of

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[2]The petitioners also attempted to secure review by certification, 28 U.S.C. §1292(b). Upon petitioners' motion, the district court certified its decision. (Pet. App., 18a.) However, the Court of Appeals denied the defendants' Petition to accept that appeal.

Appeals brief argued both that (i) the issue of qualified immunity was subject to interlocutory appeal, and (ii) that if the appeal is heard, the court should reverse the decision below and find that petitioners are immune.[3]

The respondent countered with (i) a motion to dismiss on the ground that an interlocutory appeal was not proper and (ii) a full brief on the merits of the qualified immunity defense urging affirmance of the decision below, should the court hear the appeal.

The Court of Appeals considered both issues. First, it dismissed the appeal, holding that the collateral order doctrine did not permit an interlocutory appeal

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[3]The petitioners also asserted an absolute immunity claim that was rejected by the Court of Appeals. Petitioners have not sought review of that decision in this Court.

from an order denying a claim of qualified immunity. (Pet. App. 1a.) Second, the court held, on the merits, that even if it were to hear the appeal, the court "would be obliged to find that there are genuine issues of material fact" requiring remand for trial (App. Pet., 12a).

The petitioners seek review of only the "appealability" issue.

REASONS FOR DENYING THE PETITION

The Petition seeks review of only one issue: whether the denial of a qualified immunity defense is immediately appealable. That issue is currently before this Court for review in Mitchell v. Forsyth, No. 84-335.

However, in this case the Court of Appeals ruled, not only that qualified immunity was not appealable, but also

alternatively held that, even if it were appealable, the case would have to be remanded for trial because of many outstanding "genuine issues of material fact." Petition for Certiorari Appendix ("Pet. App."), 12a. Inasmuch as the petitioners do not seek review of that alternative ground for decision, this case will necessarily have to be remanded for trial regardless of how the appealability issue is decided in Mitchell v. Forsyth. Therefore, the Petition should be denied.

In a footnote (Pet., at 5 n.4), petitioners acknowledge two critical facts.

First, petitioners admit their previous concession that "a trial cannot be avoided where there are genuine issues of material fact relating to the qualified immunity defense," id., see government's

brief in Mitchell v. Forsyth, supra at 24-25 n.16.

Second, petitioners acknowledge that the Court of Appeals decision below stated that, even if the appeal were permitted, and the Court "were to undertake review on the merits," the Court would "be obliged to find that there are genuine issues of material fact concerning what the FBI agents did...," id. Indeed, the Court of Appeals described those factual issues in some detail:

> "As the magistrate found, 'while the broad, underlying facts as recited above are uncontested, many facts more subtle (especially in the area of intent and motive), but critical to a just determination of this case, are contested and genuinely in issue.' Kenyatta alleges, and has gathered some evidence in support, that the actions taken by the agents manifest racial animus and that they were undertaken in order to disrupt and inhibit Kenyatta's advocacy on account of its content. The agents, by contrast,

contend that their actions were motivated solely by legitimate law enforcement purposes....

"In addition, the agents allege that, if their actions violated rights clearly established at the time, they are nevertheless immune under Harlow because, due to extraordinary circumstances, they neither knew nor should have known that their actions violated Kenyatta's rights. By raising this alternative argument for immunity, the agents themselves create two issues of fact, one objective and one subjective: were there any extraordinary circumstances, and, if there were, did they make the agents ignorant of the constitutional implications of their actions? Kenyatta has controverted the subjective issue by presenting some evidence that tends to make the agents' actual ignorance less likely. By creating the issue for Kenyatta to controvert, the agents surrendered part of the protection from litigation that the objective Harlow test might have offered them." Pet. App., 12a-14a

Thus, since there are genuine issues of fact in this case, a trial cannot be avoided, regardless of how the

appealability issue is decided.

The petitioners contend, however, that the Court of Appeals' alternative holding -- that "there are genuine issues of material fact" requiring trial -- was merely "dictum," because the merits of their defense were not "squarely faced" by the Court "after full briefing and oral argument." That characterization of the decision below is demonstrably incorrect.

First, the parties fully briefed both the appealability issue and the merits of petitioners' qualified immunity defense in the Court of Appeals,[4] and, in that

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[4]The Court of Appeals docket relects that, on the merits:

Petitioners' (Appellants') brief was filed on April 26, 1984;
Respondent's (Appellee's) brief was filed on June 4, 1984;
Petitioners' Reply brief was filed on August 2, 1984.

The appealability issue was considered
(footnote continued)

context, thoroughly addressed the question of whether material issues of fact warranted remand for trial.

Second, a single oral argument on both the appealability issues and the merits of the defense was scheduled and conducted.[5]

Third, the Court of Appeals decision speaks for itself. It says that even if the qualified immunity issue were appealable, the Court would have been "obliged to find that there are genuine

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separately:

Respondent's Motion to Dismiss was filed on June 4, 1984;
Petitioners' Opposition was filed on June 25, 1984.

[5]Much of the Court's questioning during argument focussed on the appealability question. However, the Court did inquire at length about the existence of material factual disputes. Of course, a party does not have an absolute right to oral argument in any event. Rule 34, Fed. R. App. P.

issues of material fact" requiring a remand (Pet. App. 12a). "Obliged to find" is not the language of casual dicta; rather, it is the formulation of a considered alternative holding.

CONCLUSION

Therefore, because the only issue raised by this Petition is the appealability of orders denying qualified immunity, and because this case must be remanded for trial regardless of the outcome of that appealability issue pending for decision in Forsyth v. Mitchell, No. 84-335, the Petition should be denied.

Respectfully submitted,

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